

TRIAL UPDATE
LAWYERS
INC.
MICHIGAN

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MICHIGAN ON TRIAL

Litigation Industry Looks to Recapture the Great Lakes State

Twenty-five years ago, Michigan’s lawmakers looked at a state in legal crisis. Plaintiffs’ attorneys—whom the Manhattan Institute calls Trial Lawyers, Inc.—had made the state one of its favorite jurisdictions in the nation. To restore some sanity to the civil justice system, Michigan passed a round of legal-reform legislation in 1986, a second round in 1993 (which strengthened medical-malpractice law), and a third, more comprehensive, round in 1995.¹ As we shall see, these steps have been highly successful at curbing lawsuit abuse. Little wonder, then, that Trial Lawyers, Inc. is now committing its powerful lobbying and public-relations resources to rolling back laws that have put a dent in the litigation industry’s bottom line.

A STATE IN LEGAL CRISIS

By the mid-1980s, trial lawyers had begun to exert such control over Michigan’s legal system that their industry was having a deleterious effect on the finances of the state government. The state faced 1,400 lawsuits claiming \$2.4 billion, an amount equivalent to half of the general budget.² In 1984, payouts by the state transportation department, to give just one example, equaled 30 percent of its outlays on road building and improvement.³ Municipalities were also being hammered: a village with just over 1,500 residents was stuck with \$480,000 of a \$500,000 jury verdict in a case in which a driver struck a pedestrian. The jury found that the village was 10 percent at fault for failing to mark the side of the road adequately, but because the driver had only

\$20,000 in insurance, the village had to pay most of the damages.⁴ A 1985 report issued by the state senate declared: “Liability has reached epidemic proportions and presents an emergency situation to the Legislature.”⁵

Michigan legislators’ concerns went beyond the threat to the public fisc. They were also worried about medical-malpractice liability, which was curtailing access to care. Medical-malpractice claims in the state had spiraled upward from ten per 100 doctors in 1979 to 25 per 100 by 1985—an increase of 150 percent in just six years.⁶ From 1970 to 1984, the large Detroit metro-area counties of Wayne, Oakland, and Macomb had seen their malpractice filings jump an astounding 1,100 percent.⁷ Unsurprisingly, medical-malpractice insurance costs had also doubled in the period 1980–84 and grown even faster in the riskiest specialties.⁸ Michigan doctors took notice: 42 percent of Michigan family physicians reported that they had ceased delivering babies or reduced the number they delivered, and an even higher percentage of such doctors reported that they had cut back on surgery and treating patients likely to require intensive care.⁹

THE MICHIGAN LEGISLATURE RESPONDS

In response to these developments, the Michigan legislature in 1986 passed legislation that became a blueprint for other states trying to curb lawsuit abuse. Action was necessarily

THE FACE OF TRIAL LAWYERS, INC.

Geoffrey Fieger might be said to be the president of Trial Lawyers, Inc.'s Michigan operations. The Southfield-based attorney is perhaps best known for defending assisted-suicide doctor Jack Kevorkian, but he earns his keep as a plaintiffs' lawyer: Fieger claims to have won more multimillion-dollar verdicts than any other attorney in the country.¹⁰ His big verdicts have come in medical-malpractice, civil rights, and sexual-harassment cases, as well as in sensational trials, like the one he conducted against the *Jenny Jones Show* for failing to screen properly a guest who later killed a homosexual man, supposedly because the latter revealed on a taping of the show that he secretly admired the killer.¹¹

Fieger has been at the forefront of the Michigan trial lawyers' public- and government-relations activities. Fieger ingratiated himself with Michigan State University's law school by giving it \$4 million to establish the Geoffrey Fieger Trial Practice Institute.¹² In politics, Fieger was the Democratic Party's nominee for governor in 1998; in that campaign, he asserted that the



AP Photo/Paul Sancya

incumbent, John Engler, was the offspring of barnyard animals.¹³

Fieger has been no less brazen in his statements about state supreme court justices who have ruled against him. He has called them "jackasses," "Hitler," "Goebbels," and "Eva Braun."¹⁴ The level of hostility between Fieger and some of the justices led him brazenly to challenge four of the seven justices to recuse themselves from all his cases—a step that would assure him victory before the high court.¹⁵

Most recently, Fieger's political efforts got him into hot water. He was indicted by a federal grand jury for "conspiring to make more than \$125,000 in illegal contributions to presidential candidate John Edwards's 2004

campaign."¹⁶ The ten-count indictment alleged that Fieger and his law partner recruited "straw donors" to make contributions to Edwards, a former trial lawyer himself, and then reimbursed them in an effort to evade federal campaign limits.¹⁷ On June 2, a jury acquitted Fieger of the charges.¹⁸

bipartisan: Republicans controlled the Senate by a narrow 20–18 margin, and Democrats had to contend with a similarly narrow 57–53 majority in the House. Each body set up special investigative committees, which held extensive public hearings and heard expert testimony. These committees crafted what became Public Act 178, which introduced major changes to Michigan tort law generally, as well as to medical-malpractice law per se (see box, page 4).

By 1993, the Michigan legislature had determined that its medical-malpractice reforms needed to be strengthened, and so it passed a new round of bipartisan measures. The reforms it passed next, in 1995, focused on products liability, which

had specifically been exempted from the 1986 legislation. Michigan's political leaders feared that the state's eroding manufacturing base was coming under further threat from an uncertain legal climate, particularly now that competing states such as Illinois and Indiana had passed comprehensive tort-reform legislation.

A RECORD OF RESULTS

After the 1993 and 1995 reforms passed, Michigan saw quick and dramatic results. Filings of tort lawsuits fell over 50 percent in the year after the latter law took effect and have

KEY LEGAL REFORMS IN MICHIGAN

The state of Michigan has had three rounds of legal reform: in 1986, 1993, and 1995. Below are some of the reforms' key provisions.

1986: General and Medical Malpractice

- *Venue Reform.* The Michigan legislature found that plaintiffs' lawyers were shopping their cases to forums they deemed "friendly," even when their location had little relationship to the case. It therefore passed a law generally requiring cases to be filed in the county where the alleged injury occurred or where the defendant is located.
- *Joint-and-Several Liability.* In addition, lawmakers were concerned that the litigation industry was suing parties with deep pockets but little connection to a plaintiff's injury. As a consequence, defendants that juries determined to be as little as 5 percent at fault were being stuck with 100 percent of the damages.¹⁹ The new law reformed the doctrine of "joint-and-several liability," as it applied to areas of tort law other than products liability, by limiting a defendant's damage payouts to its share of responsibility; special protections of government bodies were also enacted to cover cases in which a plaintiff was judged to be partially at fault.
- *Medical Malpractice.* For medical-malpractice cases in particular, the 1986 law imposed more stringent standards on expert-witness testimony, which the state legislature concluded was being used to bring scientifically dubious cases. Also, because the legislature found that a large and increasing share of the payouts in medical-malpractice suits went for noneconomic damages such as "pain and suffering," the new law capped them at \$225,000 per case, though it provided for numerous exceptions.

1993: Medical Malpractice

- *Evidence and Disclosure.* In expanding the 1986 medical-malpractice reforms, the 1993 legislature revised expert-

witness requirements and mandated that parties to a lawsuit give greater access to each other's medical records.

- *Noneconomic Damages.* The 1993 reform package also extended the cap on noneconomic damages to include all malpractice cases, though it raised the cap to \$280,000 (or \$500,000, depending on the category of defendant).

1995: Products Liability and Failure to Warn

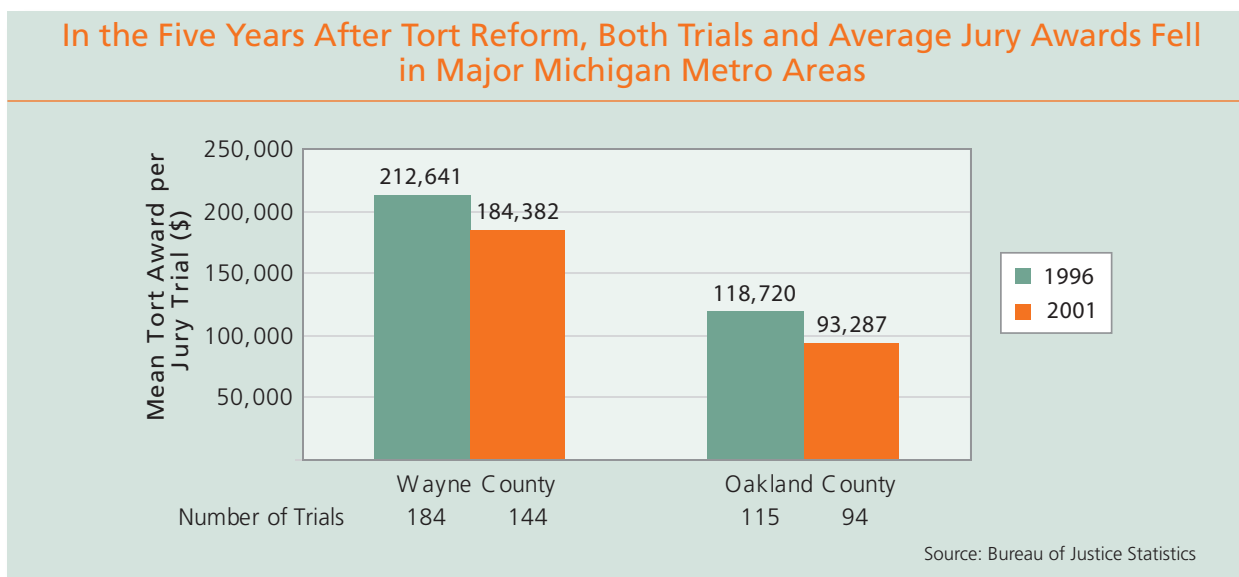
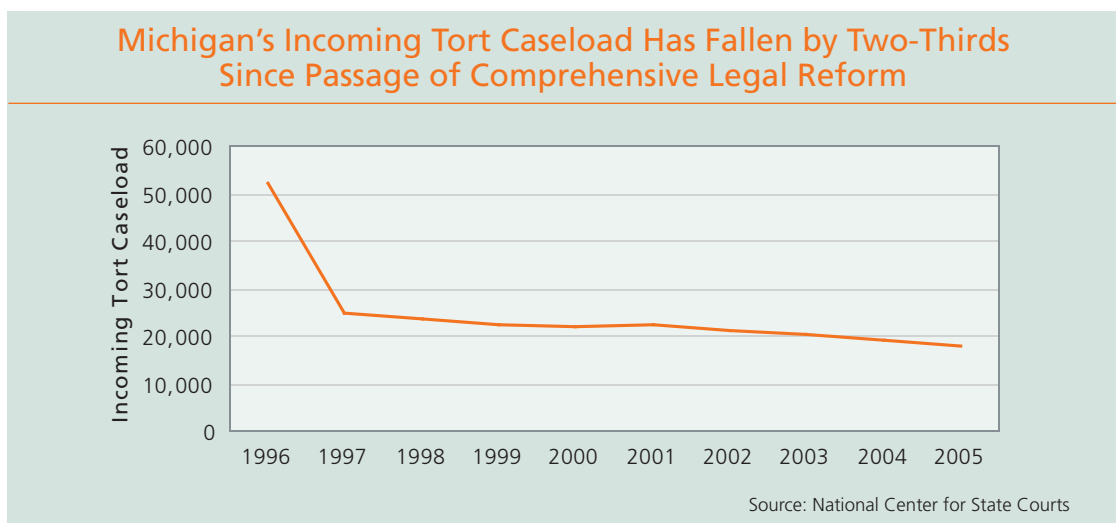
- *Products Liability.* In 1995, the legislature found that manufacturers were being held liable for products judged defective even when an alternative design was not feasible; when the design was in compliance with state and federal regulation; and even when a purchaser of the product made modifications to it. The new law protects manufacturers in such cases, though the "regulatory compliance" protection is only a presumption that can be rebutted with evidence in court.
- *Failure to Warn.* The legislature also found that defendants were being held liable for "failing to warn" customers even of obvious risks. Such rulings encourage manufacturers to flood consumers with ever more warnings, which make real risks harder to discern. One Michigan legal-reform group has even begun to hold an annual "wacky warnings" contest to parody the practice.²⁰ The 1995 law thus protected manufacturers from suits over a failure to warn of risks that were, in fact, common knowledge.
- *FDA Preemption.* The legislature also protected manufacturers of pharmaceuticals and medical products from failure-to-warn suits if the warnings in question had been approved by the U.S. Food and Drug Administration. The FDA closely monitors drug-safety warnings. In many instances, it has determined that "over-warning" can pose significant risks to public health. Michigan's law protects this regulatory scheme from second-guessing by juries of ordinary Michigan citizens.

continued to decline since then; by 2005, tort actions in Michigan had dropped to a third of their 1996 level (see top graph, below).²¹ Five years after the reforms, the number of cases that were proceeding to trial in big counties like Wayne and Oakland had declined by more than 20 percent, and the average jury verdict in cases that did go to trial had fallen by 13 to 21 percent, not accounting for inflation (see bottom graph, below).²²

The results of this reduction in legal activity were salutary and met the lawmakers' goals. As medical-malpractice insurance rates soared nationwide, those in Michigan remained stable.²³ And because the reforms have not been reversed, insurers

have even been able to reduce rates: in 2008, Michigan's largest medical-malpractice insurer of physicians cut its rates an average of 6.5 percent statewide, with average rates in Wayne County falling 13 percent.²⁴ Rates are going down even for the most vulnerable specialists: by 12 percent for neurosurgeons, by 14 percent for obstetricians, and by 25 percent for orthopedic surgeons.²⁵ These changes not only benefit doctors but also improve patients' access to care. Moreover, they reduce the practice of defensive medicine, which in turn leads to better and more affordable health care.²⁶

As lawmakers anticipated, the reforms also helped to attract new businesses and allowed Michigan to diversify away from



TRIAL LAWYERS TARGET TAYLOR



AP Photo/Al Goldis

Michigan Supreme Court Chief Justice Clifford W. Taylor was appointed by Governor John Engler to the state court of appeals in 1992, and then appointed to fill a supreme court vacancy in 1997. His colleagues elected him chief justice in 2005 and again in 2007.

Chief Justice Taylor has been at the forefront of the effort to improve Michigan's courts, having served on the Michigan legislature's Commission on the Courts in the 21st Century; and he has served as a national leader in judicial education as a member of the board of the George Mason University Law and Economics Center. The chief justice is a particular expert in tort law: he coauthored the authoritative examination, in three volumes, of personal-injury law in Michigan.

Trial Lawyers, Inc. has been hoping to replace this well-schooled and principled jurist; with liberal activist justices holding three of the seven seats on the court, replacing Justice Taylor with one of their own would facilitate a judicial assault on legislatively enacted tort reforms. The litigation industry has been flexing its political muscle in the Michigan Democratic Party, which in May announced that Justice Taylor would be its "Top Target" in the 2008 elections.²⁸ The press release detailing the Democratic strategy for unseating Taylor took him to task for writing "the judicial decision upholding Michigan's [FDA preemption] law"²⁹—a clear sign that Trial Lawyers, Inc. wants to undo the legislature's work on legal reform by installing a justice willing to substitute his policy preferences for those of the people's elected representatives.

its traditional manufacturing base. From 1999 through 2002, more biotechnology companies were started in Michigan than in any other state in the union.²⁷

TRIAL LAWYERS LOOK TO TURN BACK THE CLOCK

One business that has not benefited from Michigan's legal reforms, of course, is Trial Lawyers, Inc. The litigation industry is now flexing its lobbying and public-relations muscles in an effort to undo the state's reforms. The first stop for Trial Lawyers, Inc., predictably, was the courts. As part of a nationwide push,³⁰ trial lawyers in Michigan sought to have legislatively enacted tort reforms overturned there, but they were rebuffed by the state court of appeals in 1996 and the state supreme court in 1999 and again in 2004.³¹

At the same time, the trial lawyers were working diligently to elect their favored candidates to the bench. Republican supreme court justice Elizabeth Weaver was elected in 1994, having raised just \$187,000, but campaign-finance records later showed that the trial bar raised some \$500,000 for one of her opponents.³² Understandably, the business community was alarmed. The state chamber of commerce began working to inform voters about the impact of litigation on the overall business climate, and business leaders and reformers formed Michigan Lawsuit Abuse Watch (M-LAW), which evaluates judges' rulings and tries to raise public awareness through efforts such as a contest to identify the wackiest warning labels.

Strict-constructionist judicial appointments by conservative governor John Engler and the election of similarly inclined judges eventually tipped the balance away from the trial lawyers, who fought back furiously. In 2000, they vigorously backed three of six judicial candidates seeking three seats on the state supreme court; all told, the candidates spent a record \$6 million, and independent groups spent an additional \$10–12 million in a battle royal chronicled by Michigan supreme court justice Robert Young for the Manhattan Institute in 2001.³³

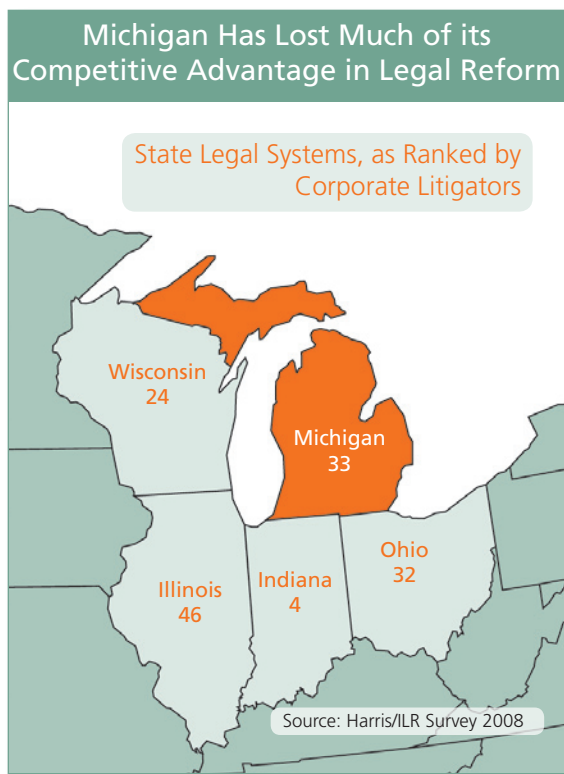
Unfortunately for the trial lawyers, their candidates were all defeated. Even so, strict constructionists today have a bare majority of four to three, and Trial Lawyers, Inc. is making a vigorous effort this year to unseat Justice Clifford Taylor (see box, opposite page).

Having failed in the courts, the litigation industry is now working to undo Michigan's legislative reforms. Spurred by the Vioxx litigation, the trial bar has been working since 2005 to repeal the state's FDA-defense law (see box, page 4), as we chronicled in a 2006 *Trial Lawyers, Inc. Update*.³⁴ More recently, Trial Lawyers, Inc. has been working to expand the scope of the state's consumer protection laws, with the intent of permitting plaintiffs to win damages without meeting the basic requirements of tort law, such as the occurrence of an actual injury, and also to extend retroactively various statutes of limitations.³⁵

In its public-relations efforts, the Michigan trial bar has even been trying to rebrand itself. Taking a cue from its national counterpart, the Michigan Trial Lawyers Association renamed itself the Michigan Association for Justice.³⁶ Last year, its president made the incredible claim that tort reforms were somehow responsible for Pfizer's decision to close a plant in the state. He even blamed tort reforms for the state's overall economic woes.³⁷

WHERE SHOULD MICHIGAN GO FROM HERE?

The association's president did get one thing right: Michigan's economy is ailing. In April, the state's unemployment rate was 6.9 percent, well above the national average, and in the past year, the state economy has shed 72,000 jobs.³⁸ Year-over-year retail sales growth trails inflation by a substantial margin, and the state's annualized growth rate in the first quarter of 2008 was an anemic 0.9 percent.³⁹ Such economic conditions are precisely why legal reform in Michigan remains so important: the state's legal climate remains a rare domain of competitive advantage, given the state's relatively high tax rates, as well as labor laws that hamper local companies' ability to compete with companies doing business in states with right-to-work laws or in foreign



countries. Within the automotive sector, which is mainly responsible for Michigan's economic woes, light-vehicle sales today are 11.2 percent lower than they were a year ago; in April, they reached their lowest point since August 1998.⁴⁰

Far from needing decades of legal progress reversed, Michigan would be wise to go further in the direction of tort reform, if for no other reason than that other states have begun to catch up with it. In the U.S. Chamber of Commerce's annual survey of business leaders and counsel on the subject of states' legal climates, Michigan now ranks only 33rd, below its neighbors Ohio (32nd), Wisconsin (24th), and Indiana (4th) (see graph).⁴¹ Accordingly, the Michigan Chamber of Commerce is pushing for a "loser pays" law, stronger incentives to settle cases, limitations on trial-lawyer contingency fees, and heightened sanctions for filing frivolous lawsuits.⁴² Each of these ideas is worthy of serious consideration. If instead of taking these positive steps, the legislature reverses course on tort reform, or the trial lawyers seize control of the state supreme court, the consequences for Michigan's already suffering economy could be severe.

Endnotes

- ¹ See Public Act 178 (1986); Public Act 78 (1993); Public Act 161 (1995); Public Act 249 (1995).
- ² See Senate Select Committee on Civil Justice Reform: A Report on Civil Justice in Michigan 5 (Sept. 26, 1985).
- ³ See Michigan Chamber Foundation, *Legal Reform in Michigan: Past, Present, and Future 5* (2007).
- ⁴ See *id.* (citing Senate Report, *supra* note 2).
- ⁵ *Id.* at 4 (citing Senate Report, *supra* note 2).
- ⁶ See Senate Report, *supra* note 2, at 12.
- ⁷ See *id.* at 4-5.
- ⁸ See Report of the House Special Committee on Liability Insurance 2 (Oct. 31, 1985).
- ⁹ See Senate Report, *supra* note 2, at 2.
- ¹⁰ See http://www.fiegerlaw.com/about_geoffrey_fieger.html.
- ¹¹ See *id.*
- ¹² See News Release, Fieger's \$4 Million Gift (Nov. 27, 2001), available at <http://newsroom.msu.edu/site/indexer/861/content.htm>.
- ¹³ See Ceci Connolly, *Brash Candidate a Problem in Michigan?*, WASH. POST (Sept. 24, 1998), at A8.
- ¹⁴ Walter Olson, *Mich. High Court Reinstates Geoffrey Fieger Reprimand*, OVERLAWYERED.COM (Aug. 2, 2006), available at <http://overlawyered.com/2006/08/mich-high-court-reinstates-geoffrey-fieger-reprimand/>.
- ¹⁵ See *Fieger v. Ferry*, 471 F.3d 637 (6th Cir. 2006).
- ¹⁶ See News Release, U.S. Department of Justice, Michigan Attorneys Indicted for Alleged Campaign Finance Violations (Aug. 24, 2007), available at http://www.usdoj.gov/opa/pr/2007/August/07_crm_655.html.
- ¹⁷ See *id.*
- ¹⁸ See *id.*; Jim Irwin, *Fieger Acquitted in Detroit Campaign Finance Violations Case*, AP (June 2, 2008).
- ¹⁹ See House Report, *supra* note 8, at 2.
- ²⁰ See <http://www.wackywarnings.com/>.
- ²¹ See National Center for State Courts, *Examining the Work of State Courts*, 2006 33 (2007), available at http://www.ncsconline.org/D_Research/csp/2006_files/Civil.pdf.
- ²² Compare Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties*, 2001 12 (2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/ttvlc01.htm> with *Trials and Verdicts in Large Counties*, 1996 14 (2000), available at <http://www.ojp.usdoj.gov/bjs/abstract/ttvlc96.htm>. The two years are the most recent to be released by the Bureau.
- ²³ See Michigan Chamber Foundation, *supra* note 3, at 10.
- ²⁴ See Press Release, Michigan State Medical Society, *Liability Rate Drop Shows Tort Reform is Working* (Nov. 20, 2007), available at http://www.legalreforminthenews.com/News%20Releases/MI_MedSociety_11-20-07.html.
- ²⁵ See *id.*
- ²⁶ Cf. Daniel Kessler and Mark McClellan, *Do Doctors Practice Defensive Medicine?*, Q. REV. ECON. FIN. (May 1996).
- ²⁷ See <http://www.michigan.org/medc/ttc/LifeSciences/>.
- ²⁸ Press Release, Michigan Democratic Party, *Michigan Democratic Party Highlights Cliff Taylor as Top Target in 2008* (May 29, 2008), available at <http://www.michigandems.com/052908prs.html>.
- ²⁹ *Id.*
- ³⁰ See generally American Tort Reform Foundation, *Defrocking Tort Reform* (2008).
- ³¹ See *Heinz v. Chicago Road Investment Co.*, 549 N.W.2d 47 (Mich. App. 1996), appeal denied, 567 N.W.2d 250 (Mich. 1997) (upholding collateral source reform); *McDougall v. Schanz*, 597 N.W.2d 148 (Mich. 1999) (upholding medical expert standards); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004) (upholding damage caps).
- ³² See Justice Robert Young, *Reflections of a Survivor of State Judicial Election Warfare*, Manhattan Institute Civil J. Rpt. 2 (June 2001), available at http://www.manhattan-institute.org/html/cjr_2.htm.
- ³³ See *id.*
- ³⁴ See http://www.triallawyersinc.com/updates/tli_update_michigan_0606.html.
- ³⁵ See American Tort Reform Foundation, *supra* note 30, at 8, 12.
- ³⁶ See http://www.legalreforminthenews.com/News%20Releases/MI_Chamber-MTLA-NameChange-8-7-07.html.
- ³⁷ See Robert M. Raitt, *Don't Buy Into Tort Reform's Promises*, DETROIT FREE PRESS (Sept. 7, 2007), available at <http://www.michiganjustice.org/MI/index.cfm?event=showPage&pg=press>.
- ³⁸ See Michigan Fast Facts (Apr. 2008), available at <http://www.milmi.org/>.
- ³⁹ See Senate Fiscal Agency, *Michigan Economic Indicators* (Apr. 2008), available at http://www.senate.michigan.gov/sfa/Publications/EconInd/MEI_APR08.PDF.
- ⁴⁰ See *id.*
- ⁴¹ See U.S. Chamber of Commerce Institute for Legal Reform, *Lawsuit Climate 2008*, available at <http://www.instituteforlegalreform.com/states/lawsuitclimate2008/index.cfm>.
- ⁴² See Michigan Chamber Foundation, *supra* note 3, at 24-25.

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